



STATE OF INDIANA

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November 15, 2012

Gerald D. Bolin
Spencer County Leader
P.O. Box 206
218 E. Medcalf
Dale, Indiana 47523-0206

*Re: Formal Complaint 12-FC-314; Alleged Violation of the Open Door Law by
the Luce Township Regional Sewer District*

Dear Mr. Bolin:

This advisory opinion is in response to your formal complaint alleging the Luce Township Regional Sewer District Board of Trustees ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* The Board's response to your formal complaint was due no later than November 12, 2012. Mr. John Wood acknowledged the Board's receipt of your formal complaint on October 20, 2012. As of today's date, we have yet to receive a response.

BACKGROUND

In your formal complaint, you alleged that the Board failed to properly notify the public of an executive session that was held on October 9, 2012. As a way of reference, you provide that the Board has been in the process of designing and constructing a grinder pump system to provide wastewater services to residents living within the district's boundaries. The project has taken over ten years to implement and you provide has been controversial since the beginning. The events leading to your formal complaint commenced in March 2012. You provide that the Board had been "pushing the envelope" in complying with the ODL, specifically in providing proper notice and the prohibition against serial meetings.

After discussing the issue with the Board in May, the issues improved over the next month. Thereafter, a special meeting to be held on May 24, 2012 was cancelled without notice. The meeting was rescheduled for May 29, 2012 at the Luce Government Center in Richland, Indiana. However, the Board failed to secure a key for the building. After several calls, the Board was permitted to use the Richland Methodist Church Fellowship Hall, which was approximately two blocks away. The attorney attached a hand-written note to the Government Center's door regarding the new location of the

special meeting. On June 12, 2012, the Board held an executive session prior to its regular meeting at the Hatfield Library. You provide that notice was not posted on the door upon arrival, but the Board's attorney posted an agenda with the relevant statutory code. In an article published regarding the meeting, you provide that the Board acknowledged the recent difficulties regarding public notice and promised to correct the deficiencies.

On July 26, 2012, the Board conducted a special meeting at the Richland United Methodist Church. You provide that media was not given the proper written notification, but the newspaper did receive a telephone call. After a discussion with certain Board members, you advised them that if another incident occurred, you would report the incident to the Public Access Counselor. In August 2012, after reviewing 12-FC-237 that was filed against the Board by Mr. Ingram, you again became concerned that the Board was edging towards conducting a serial meeting in violation of the ODL.

As to the current issue that is the subject of your formal complaint, you provide that on September 27, 2012, the Board was to conduct an executive session at 5 p.m. for the purpose of reviewing applicants for the office manager position, to finalize aspects of the Utility Superintendent's salary, and to conduct a performance review evaluation of the Utility Superintendent. A regular session was scheduled to follow if official action needed was necessary. Notice was properly given and there is no dispute as to the contents of the executive session. When you arrived for the public session to follow the executive session, you provide that the executive session was underway. In viewing the room that the executive session was being held, you observed that it was apparent a quorum of the Board had not been obtained. Nevertheless, the group, which included the Utility Superintendent, and the Board's President, Vice President, and Secretary, were having a discussion. You provide that no attorney was present and no agenda was posted. Forty minutes after the executive session was scheduled to have commenced, the Board's President informed you that a quorum could not be obtained for the meeting. You provide the President asked you what should be done, at which point you provided that the meeting should be closed immediately. The President indicated that the session would be rescheduled to 5 p.m., but was unsure of the availability of the meeting room. You asked that you be kept informed of the situation and waited until everyone had vacated the building. It is unknown what was discussed by the group while waiting for a quorum of the members of the Board.

Notice for the executive session did not come during the intervening weeks. On Tuesday, October 9, 2012, you arrived at the Hatfield Library to discover an executive session in progress. Once again, you provide that notice was not placed on the door. Thereafter, when the regular meeting began, no mention was made of the previous executive session. Further, notice of the executive session did not appear at the Board's Richland Office. You then verified that notice had not been provided for the executive session to the *Spencer County Leader*. As such, you allege that the Board violated the ODL by failing to provide proper notice for the Tuesday, October 9, 2012 executive session and failing to post an agenda for the executive session. You further provide that although you do not believe that the Board has currently violated the prohibition against

serial meetings, you do believe it is perilously close. You do not believe that the Board is intentionally violating the ODL; rather the events demonstrate its continued negligence of the requirements of the law. With your formal complaint you have provided email correspondence from Ms. Yeager, who apologized for the lack of notification for the executive session and recent articles regarding the Board that were printed in the *Spencer County Leader*.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

Without the benefit of a response from the Board, it is difficult for me to issue an opinion as to whether it complied with the requirements of the ODL as to the October 9, 2012 executive session. The burden is on the Board to demonstrate that it complied with the requirements of the ODL. In light of the details provided in your formal complaint and as the Board has seemingly admitted that it failed to post notice of the executive session in Ms. Yeager’s October 11, 2012 email correspondence, it is my opinion that the Board violated the ODL by failing to provide proper notice for its October 9, 2012 executive session.

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the

location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. *See Opinion of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43.* The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *Opinion of the Public Access Counselor 04-FC-02 and 08-FC-17.* As applicable here, if the Board utilized an agenda for its October 9, 2012 executive session and failed to post a copy prior to the meeting, it is my opinion that it violated the ODL.

Although not alleged in the formal complaint, the Board should be aware of the ODL's prohibition against serial meetings. A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. As applicable to the Board, I.C. §§ 5-14-1.5-3.1(a), (c), and (d) provides the following regarding serial meetings:

Sec. 3.1. (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

- (A) project;
 - (B) program; or
 - (C) facilities of applicants for incentives or assistance from the governing body;
 - (3) traveling to and attending meetings of organizations devoted to the betterment of government;
 - (4) a caucus;
 - (5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;
 - (6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;
 - (7) a gathering for the sole purpose of administering an oath of office to an individual; or
 - (8) a gathering between less than a quorum of the members of the governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.
- (d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter.

The Board should be aware of the ODL's prohibition against serial meetings and govern its future actions accordingly.

CONCLUSION

Based on the foregoing, it is my opinion that the Board violated the ODL by failing to provide proper notice for the October 9, 2012 executive session. Further, it is my opinion that the Board violated the ODL if it utilized an agenda for the October 9, 2012 executive session, but failed to post a copy at the door prior to the start of the meeting.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Luce Township Regional Sewer District